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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. THAM BUI, Defendant and Appellant.	H044430 (Santa Clara County Super. Ct. No. C1502175)

A jury found defendant Tham Bui guilty of conspiracy to commit murder (Pen. Code, §§ 182, 187, subd. (a))[1] (count 1); first degree burglary (entry of inhabited dwelling with intent to commit murder) committed on November 7, 2013 (§§ 459, 460, subd. (a)) (count 2); assault with a deadly weapon, a baseball bat, committed on November 7, 2013 (§ 245, subd. (a)(1)) (count 3); arson of an inhabited structure committed on December 29, 2014 (§ 451, subd. (b)) (count 4); first degree burglary committed on December 29, 2014 (§§ 459, 460, subd. (a)) (count 5); and arson of property (a Lexus RX 350) committed on January 14, 2015 (§ 451, subd. (d)) (count 6).[2] As to counts 2 and 5, the jury found true that a person not an accomplice was present in the residence during the commission of the offenses (§ 667.5, subd. (c)(21)). As to count 4, the jury found true that the arson was committed by use of a device designed to

[1] All further statutory references are to the Penal Code unless otherwise provided.

[2] The jury found defendant not guilty of committing, on March 4, 2015, aggravated or simple mayhem (§ 205) (count 7 and lesser offense to count 7) and throwing caustic chemicals (§ 244) (count 8).

accelerate the fire (§ 451.1, subd. (a)(5)). The target of all the crimes was C., a woman whom defendant had dated.

In a bifurcated trial, the court found true that defendant had two prior strike convictions within the meaning of the Three Strikes law (§ 667, subd. (b)-(i), 1170.12), two prior serious felony convictions (§ 667, subd. (a)), a prior prison term within the meaning of section 667.5, subdivision (a), and two prior prison terms within the meaning of section 667.5, subdivision (b).

After denying the defense's *Romero* motion (see *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), the trial court sentenced defendant to consecutive indeterminate terms of 75 years to life on count 1, 30 years to life on count 4, 25 years to life on count 2, and 25 years to life on count 6 to be served consecutively to a total determinate term of 48 years. It stayed the punishment imposed on counts 3 and 5 pursuant to section 654.

On appeal, defendant contends the trial court erred by (1) denying his motion to suppress evidence; (2) ruling admissible a surreptitious recording of defendant's conversation with C. and a letter from Robert Styre, the direct perpetrator of the first-degree burglary and assault with a deadly weapon committed on November 7, 2013; and (3) instructing pursuant to CALCRIM No. 315 that in evaluating identification testimony, the jury could consider the certainty of the witness in making an identification. Defendant raises an ineffective assistance of counsel claim in the event we find defense counsel's evidentiary objections were insufficient. He asserts that the cumulative prejudice from the asserted errors requires reversal.

Defendant also asks us to review the sealed transcript of an ex parte hearing on October 17, 2016 to determine whether any information should have been disclosed to the defense. With respect to sentencing, defendant argues that the punishment imposed on count 2 must be stayed under section 654, that he was not properly sentenced for the residential arson, and that this court should remand the matter to allow the trial court to

exercise its discretion under newly amended section 1385 with respect to his prior serious felony convictions.[3]

We conclude that defendant had no legitimate expectation of privacy, which society is willing to recognize as reasonable, in the real-time cell site location information (CSLI) that was briefly accessed and contemporaneously used to visually locate and arrest him on the public streets. We agree that there were two sentencing errors, but we otherwise find no prejudicial error. Accordingly, we modify the judgment and affirm the judgment as modified.

I

Evidence

Defendant's Relationship with T.K.

A woman named T.K., who had an on-and-off romantic relationship with defendant for five or six years and who had had two children with him, testified at the trial in 2016. She claimed that their relationship had ended when her youngest child was born 23 years ago. However, T.K. acknowledged that she had been in touch with defendant at various times.

In January of 2010, a letter to T.K. from defendant, who was then in state prison, was intercepted in the prison mailroom by David J. Doglietto, who worked for the California Department of Corrections and Rehabilitation. Doglietto was assigned to Soledad State Prison in Monterey County and was a senior investigator in its investigative services unit. He investigated defendant in connection with the letter. The parties stipulated that defendant was in Soledad State Prison in 2010 at the time of the investigation.

[3] Defendant filed a petition for writ of habeas corpus (*In re* THOM BUI, H046438), which this court ordered to be considered with this appeal. We dispose of the petition by separate order.

The letter to T.K. was written mostly in English (approximately 90 percent), and the remainder of the letter was in Vietnamese. The letter informed T.K. in Vietnamese, which was translated by a sergeant who was a native Vietnamese speaker, that defendant had left his cell phone in the south facility. The letter instructed her not to "accept any more phone calls that come from the south facility" that she did not recognize as being from "Tham," impliedly defendant. Possession of cell phones in a California State Prison is a violation of law and prison policy.

In addition, T.K. testified at trial that she had known C. for approximately a decade and once considered C. a close friend but that their friendship had ended in 2013. At one point T.K. testified that her friendship with C. ended because they were fighting and C. was dating defendant. T.K. acknowledged that she went on a trip to Vietnam with C. and that during that time she found out that C. was dating defendant. After the trip, T.K. was no longer friends with C.

C.'s Relationship with Defendant

C. indicated that she ordinarily went by her American name and that only a few people, including defendant and T.K., used her given Vietnamese name. C. met defendant at his house in Los Angeles in early May of 2013 when T.K. introduced her to him. C. began a romantic relationship with defendant immediately before she went to Vietnam with her mother and T.K. in May of 2013. She was in Vietnam for almost three months.

While in Vietnam, C. texted with defendant "pretty much every day." Part of the time C. was in Vietnam, defendant stayed in her house with her older son. Defendant drove C.'s Lexus while she was in Vietnam. When C. returned from Vietnam, defendant picked her up at the airport.

After C. returned from Vietnam in August 2013, her romantic relationship with defendant continued. However, defendant sometimes disappeared for a day or two, which caused them to argue.

C. texted with defendant often, usually a couple of times a day. Defendant called C. by both her American and given Vietnamese names. He sometimes called her "Em," which denoted a younger woman. That name appeared often in defendant's text messages to her.

Defendant used many different phone numbers. Multiple text messages were exchanged between C.'s cell phone number and a particular phone number used by defendant between August 11, 2013 and September 5, 2013. Multiple text messages were exchanged between C.'s cell phone number and another phone number used by defendant between October 18, 2013 and October 29, 2013.

At approximately 2:00 a.m. on October 26, 2013, C. surreptitiously recorded an extended conversation, approximately 56 minutes long, between defendant and her on her cell phone while the two of them were in his car. At trial, C. explained that she made the recording because defendant had "lied too much" and she was concerned that defendant wanted to hurt her family. At the time of the recording, she was unaware that doing so might be illegal. At trial, C. was granted use immunity, which precluded the use of her trial testimony, and any evidence derived from that testimony, in any criminal prosecution against her for crimes other than perjury.

Prior to C.'s audio recording of that conversation, defendant had ostensibly given her older son a motorcycle, which had not actually belonged to defendant. It belonged to a woman, whom defendant knew because she was a friend of a male friend of his daughter. Defendant had given the keys to the motorcycle to C.'s older son and told him to go pick it up at T.K.'s house. After her son brought the motorcycle home and put it in their garage, the police came to the house. Her older son was arrested, jailed, and charged with possession of a stolen motorcycle. The parties stipulated at trial that the case against C.'s older son for possession of a stolen motorcycle was ultimately dismissed and that defendant was "not convicted [in] the motorcycle case."

Also, defendant had given C., who was receiving assistance from the housing authority, four handwritten letters that defendant had told her had been sent to the housing authority. The letters reported supposed misconduct, including that C. had taken a vacation and had a car and that her son was selling or doing drugs. Defendant told C. that people " 'out there' " were " 'trying to say [C.] shouldn't receive public assistance.' " The letters did not appear to C. to be in defendant's handwriting. Defendant explained to C. that the letters had been intercepted by a relative who worked as a manager in the housing authority and warned defendant that his " 'girlfriend [was] in trouble.' " C. was never contacted about the letters by the housing authority.

C. later heard from the owner of the stolen motorcycle that a male friend of defendant's daughter had written the letters for defendant. By October of 2013, C. believed that defendant was somehow responsible for the letters.

In addition, prior to C's recording of their conversation, C.'s older son had seen photos of a naked or partially naked woman named T.T. on defendant's cell phone, and C.'s son had told her about them. C. became upset with defendant because she thought that defendant had had sex with T.T. T.T. was the manager of a jewelry store for which C. had formerly worked. Defendant acknowledged that he had the photographs, but he told C. that he was going to use them to get money from T.T. According to C., defendant's plan was to blackmail T.T. twice. In text messages before the recording, C. threatened that she would go to the store and confront the woman, but she did not. According to C., at some point T.T. had called C. and apologized, and asked C. to "leave it alone."

Text messages exchanged between defendant and C. before their recorded conversation on October 26, 2013 indicated that C. was aware that defendant was extorting money from T.T., apparently by threatening to disclose the photographs to T.T.'s husband or others, possibly on the Internet. On October 24, 2013, defendant sent a text message to C., reading "[T.T.'s] mom is willing to talk." Defendant later asked C.,

"Em $35[,] take it??" and C. replied in part, "$ 50 no less." At trial, C. testified that those texts referred to $35,000 and $50,000. During a further exchange of text messages on October 25, 2013, defendant indicated that he was going to the bank, and C. warned defendant that the camera at the bank would capture his face and instructed him, "Tell them see you some place you choose!!!!" Subsequently, defendant texted in part, "[T]hey giving me the $ and I go home." C. asked, "What # ?" Defendant replied, "7." At trial, C. testified that defendant was talking about $70,000. Minutes later, defendant texted, "[I]ts a lot of $ to get at one time."

The audio recording of the conversation between defendant and C. was admitted into evidence and played for the jury. A transcript of the conversation was also admitted.

During their recorded conversation in the early hours of October 26, 2013, C. and defendant talked about the motorcycle case in which C.'s older son had been arrested. They briefly spoke about C.'s belief that a named male had written the papers to "the [h]ousing [authority]" for defendant.

Defendant also talked about his plan with others to rob an old sports bookie who took football bets and had lots of cash on hand when there was a "game going on." Defendant indicated that the bookie would not report the theft because what he was doing was illegal. Defendant indicated that he and others had been following the bookie. When C. asked defendant why he had already spent $1,000, impliedly of the money that he had extorted, defendant explained that it was a "thank you" for the "street guys [who] showed the way," "like in the old days [when] we'd go rob the companies." Defendant compared the prospective robbery of the bookie to robbing a company, which involved paying for information to do the job. At trial, C. indicated that defendant had been talking about robbing companies with "memory chip[s]."

Defendant talked about the extortion of T.T., his interactions with T.T. and her mother, how much money he had extorted, and with whom he was stashing it. Defendant

mentioned making a down payment on a house where C. and he would live together. The recording ended when they reached a motel.

According to C., at some point they had talked about buying a house and moving in together. They had planned to use the extortion money for a down payment. But C. did not want the house to be put in her or her son's name because she wanted to continue to receive a monthly stipend from the housing authority. C. acknowledged that she had intended to commit fraud on the housing authority.

At trial, C. acknowledged that she had been convicted of two misdemeanors for violating section 550 (making a false insurance claim) on October 26, 2006, and that she had been convicted of misdemeanor petty theft on November 12, 2004.

Text Messages between Defendant and C. After the Recording

After her surreptitious recording of defendant, C. told defendant what she had done in a text message sent on the morning of October 26, 2013. At trial, C. acknowledged their conversation did not go well after that. Defendant told C. by text that conspiracy carried "the same time" as the person committing the crime. A little later, C. texted, "Meet me at the police station!!!!" At trial, C. denied that she was threatening defendant with the recording of their conversation in her text messages. C. claimed the text message telling defendant to meet her at the police station concerned another matter. However, she acknowledged that defendant was upset that she had recorded him.

In text messages sent later on October 26, 2013, defendant indicated to C. that he was going to a number of banks to prevent the money from being traced. At trial, C. confirmed that defendant was going around getting cashier's checks that day. In a text message, C. warned defendant that the cameras at the banks were recording him and that going to so many banks in the same day would raise a question. In a text message, defendant mentioned the possibility of putting the money on a prepaid card in the future. In response, C. indicated the idea was stupid and reminded defendant that she had offered to put the money in the bank account of her older son's girlfriend.

Multiple text messages were exchanged between C.'s cell phone number and another phone number used by defendant between October 31, 2013 and November 20, 2013. However, during that period, no text messages were exchanged between those phone numbers on November 3, 2013 through November 8, 2013.

On the morning of November 7, 2013, C. was attacked in her home.

November 7, 2013

C. lived in a rented house on Beaver Creek with her two sons; she had lived there for many years. On the morning of the attack, C. was getting ready to go to work. She turned around and saw a man approximately 10 steps away from her, near the door of her bedroom. The intruder immediately attacked her with a bat, striking her in the head. She was crawling on the floor, crying, and calling her younger son, who she thought was still in the house. C. tried to block the bat with her hand and suffered a broken wrist. The attacker was striking her around her head and shoulders.

That morning, C.'s younger son, T., was in bed in his room and awoke to his mother's screaming. C.'s older son had already left for work. T. followed the sound of his mother screaming past his brother's room into her bedroom, where he saw a man hitting her with a bat. C. was on the ground. T. grabbed the bat and then wrestled the man to the ground. Using a belt, which his mother handed to him, T. restrained the attacker. At trial, T. testified that the baseball bat was not his and that he had never before seen the bat or the attacker.

At the time of trial in October of 2016, T. was on court probation for a "DUI conviction." He acknowledged that on January 22, 2008, a juvenile petition for felony robbery had been sustained and that on September 13, 2007, a juvenile petition for felony "possession of a stolen vehicle" had been sustained. He could not remember whether a juvenile petition for petty theft had been sustained on August 30, 2007.

At about 7:30 a.m. on November 7, 2013, Timothy Harden, a San Jose police officer, responded in his patrol vehicle with lights and siren to a report of an armed

residential robbery. While approaching the single-family residence from the driveway, Officer Harden immediately heard a woman, who sounded panicked, screaming for help. Two other officers and Officer Harden ran into the house through the unlocked front door. In the hallway, Officer Harden met a Vietnamese female, who appeared to be in her 40's and who was holding her head. She said that she had been hit with a bat, pointed to the master bedroom and said that her son was fighting with the suspect.

Officer Harden ran into the master bedroom and saw an Asian male, who was approximately 5 feet 6 inches tall, on top of a white male, who was approximately 6 feet 2 inches tall and 220 pounds. The suspect's feet had been tied with a belt. The suspect was wearing gloves. His forehead was tattooed with the letters "B.B.C." Officer Harden and his partner took the suspect into custody.

An aluminum Little League bat was found at the scene. The back door was found open.

The suspect was bleeding from his head, and it appeared to Officer Harden that the Asian male had tackled the suspect and that the suspect's head had split open when it hit the master bathroom wall, which had blood on it. An ambulance was called, and the suspect received medical attention for his injury. Officer Harden conducted a records check on the suspect, who was identified as Styre, and learned that he was on parole for burglary and assault with a deadly weapon. There was a warrant for his arrest for violating parole by absconding.

San Jose Police Officer Jose Reyes searched Styre incident to his arrest. Officer Reyes did not find a wallet or a cell phone on Styre.

After Styre's arrest, C. looked around the house. No drawers had been opened, and nothing had been taken.

Officer Harden accompanied Styre to the hospital and later booked him into jail.

C. did not suspect that defendant had anything to do with the attack on her. She considered it a random incident in a bad neighborhood. However, defendant had been to her house on Beaver Creek, and he knew the layout of that house.

Styre's Mother

Styre's mother lived for almost 13 years at 3015 Senter Road, before she became a transient in June of 2015. Styre's mother had last seen Styre in the morning of the day of his arrest. Styre had been living with his mother on Senter Road for a couple of months.

At 6:30 a.m. on the day of Styre's arrest, Styre's mother saw him leave the house with a tall, thin Asian man called Bui. Styre had his wallet and his phone with him. Bui, who had previously twice spent the night at her house, said that he had a friend who had work for Styre and that he was taking Styre there. Styre's mother had not seen Styre since that morning.

But Styre's mother had seen Bui outside a store later in the morning on the day Styre had left with Bui. Bui handed her a clear Ziploc bag containing Styre's wallet and phone. Bui said that nobody had heard from her son, that her son would be paid that day, and that Bui would bring her $300. Styre's mother received a phone call from her son after he was booked into the county jail.

The next day, Bui came by her house and told her that he would get an attorney for her son and bring some money to her. She never received any money from Bui.

Approximately a week later, the man called Bui contacted Styre's mother by phone, either by calling her or by sending a text message. He said that he had been out of town, he had just gotten back, and he would be coming by. During one of their contacts, Bui told her that they needed to change their phone numbers.

At trial, Styre's mother claimed that she was not sure whether defendant was the man called Bui who had left with her son on the morning before his arrest. But she remembered telling the police that the man in a photograph that was shown to her was the man who left her house with her son.

At trial, Styre's mother admitted that she had used methamphetamines the day before her son's arrest. Styre's mother could not recall any 1991 convictions for forgery or violating section 470 (forgery) or having a 2003 felony conviction for possession of stolen property. She acknowledged, however, that she had been convicted for "passing bad checks." The parties stipulated that Styre had been convicted of specified crimes.

On March 26, 2015, William Tang, who was a retired San Jose police officer at the time of trial, interviewed Styre in prison. Officer Tang interviewed Styre's mother on March 31, 2015 at 3015 Senter Road.

During the March 31, 2015 interview of Styre's mother, Officer Tang showed her a photograph of defendant, whom she recognized. Styre's mother said that she thought his name was David Nguyen, but she also identified defendant by the name of Bui.

Officer Tang also executed a search warrant of Styre's mother's home on March 31, 2015. The officer seized a Metro PCS cell phone manufactured by Huawei (Huawei phone), over 40 pieces of mail, and a wallet, which contained Styre's social security card.

People's exhibit 2, a letter from Styre to his mother, was one of the pieces of mail that Officer Tang had seized pursuant to the warrant. At trial, Styre's mother acknowledged that she had received a letter from her son, who was in prison. She confirmed that the handwriting on the letter was Styre's.

A redacted letter from Styre to his mother was admitted into evidence at trial. It was dated March 4, 2015 and postmarked March 5, 2015. In the letter Styre stated in part, "I am going to be honest about why I am doing this time and am very fortunate and lucky that I'm not doing life behind these prison bars and walls right now. Mom, that morning I went to go kill a person at that house to make $20,000 . . . , a pound of drugs (crystal), a car, and food to [*sic*] the table for us. Also to get us a place of our own so you would have your own space . . . and [we] could do [whatever] we wanted without problems any more." He also said, "Mom, sorry that you were lied to, but we knew if

you were told anything different than it was a construction job, you would of [*sic*] got upset and tryed [*sic*] to prevent it and me from doing what I went to do." Styre asked for his mother's forgiveness: "So please forgive me mom as our Lord and Savior Jesus Christ has forgave [*sic*] me my sins and what I did."

Officer Tang obtained a search warrant for the Metro PCS phone records for the phone number associated with Strye's Huawei phone for the period of October 1, 2013 to November 30, 2013. Styre's Huawei phone was submitted to the crime lab following its seizure.

Cordelia Willis, who worked at the Santa Clara County District Attorney's Crime Laboratory, downloaded the contents of a black Huawei M570 cell phone. The "number one contact" in the Huawei phone was "Tham," which was associated with a certain phone number, the same number that defendant had used to communicate with C. between October 31, 2013 and November 20, 2013.

There had been 190 phone calls between Styre's Huawei phone number and the phone number for Tham. One hundred eighty-five of those calls occurred between November 2, 2013 and November 7, 2013, the date on which C. was attacked in her Beaver Creek home.

C.'s Continuing Contact with Defendant after November 7, 2013

After the attack, C. and defendant resumed their romantic relationship. When C. told defendant about the attack, he did not want to talk about it.

Approximately a month later, defendant was arrested on a matter unrelated to C. and spent about a year in jail.[4] During that period, C. spoke to defendant every day on the phone, and she visited him in jail a couple of times a week. Once or twice she put money in his jail account so that he could make purchases. In her trial testimony, C.

[4] The trial court took judicial notice of official records showing that defendant was remanded into custody on drug charges on November 22, 2013 and was released on November 25, 2014.

claimed that she was not planning on getting back together with defendant after he got out of jail, that she talked to defendant every day only to comfort him because he claimed to have nobody, that she told defendant on the phone that she was not going to get back together with him, and that defendant kept asking for her to "give him a chance."

C. and her two sons moved from the Beaver Creek house to a two story, three-bedroom house with an attached garage on Bouveron Court. After defendant was released from jail, C. picked him up at the Greyhound bus station, rented and paid for a hotel room, and stayed with defendant overnight. C. was "romantic" with defendant that night. C. secretly took defendant into her home and hid him in her bedroom for two or three days. She then told defendant that she could not continue to hide him because her son would find out. C.'s older son was angry at defendant over the motorcycle incident.

C. drove defendant to someone else's house and dropped him off. She told him that she did not want to continue their relationship. Defendant was upset, and he kept asking C. to give him another chance. He said, "It's not going to be over." The next day defendant brought flowers to C. at the doctor's office where she worked. He offered to get a drink for C.'s coworker. Defendant then ran out and got a Starbucks drink for C.'s coworker and more flowers for her. They did not talk about their relationship that day.

T.K.'s Continuing Contact with Defendant

At trial, T.K. testified that in December of 2014, while defendant was out of custody, T.K. was talking to defendant on the phone. T.K. gave defendant a box of food in approximately December of 2014 or January of 2015.

Arson of C.'s Residence on or about December 29, 2014

On the morning of the fire in the Bouveron Court house, T. was sleeping in his bed and awoke to "a big explosion," which he believed involved the water heater. When he

opened the door to his room, he saw a lot of smoke. Flames prevented him from going downstairs. To get out of the house, he jumped out the second-story bedroom window.[5]

C.'s Bouveron Court house burned down. All of T.'s personal belongings were destroyed in the fire. The car belonging to C.'s older son, which was parked in the driveway, was damaged by the fire.

On December 29, 2014, Adam Crawley, a San Jose police officer, responded to the report of a house fire on Bouveron Court. Officer Crawley collected a surveillance video from the house across the street from the house that burned. It was played for the jury at trial.

On December 29, 2014, Samantha Huynh, a police officer with the San Jose Police Department, assisted with the investigation of a residential fire on Bouveron Court. She was responsible for the collection of physical evidence, and she collected a surveillance video from one of C.'s neighbors on Bouveron Court taken on the date C.'s house burned down. The video was admitted into evidence and played for the jury. The video showed a man with dark hair walking with a red gas can on the sidewalk in one direction, and a short time later the man running back with the gas can across the neighbor's lawn. It then showed a car driving away.

At the time of trial, Lawrence Chua was a fire captain and an investigator in the arson unit of the San Jose Fire Department. He testified as an expert as to the origin and cause of fires and the use of accelerants.

On December 29, 2014, Captain Chua had participated in the investigation of a house fire on Bouveron Court. He arrived at the scene at approximately 9:00 a.m. The fire department was still actively fighting the fire at the two-story, single family dwelling. The fire had extended from its garage to a vehicle parked in the driveway next to the garage.

[5] The probation report indicates that the family dog perished in the house fire.

When he was able to walk around the exterior of the house, Captain Chua systematically observed the fire's effects. He determined that the fire had started on the house's interior and extended to its exterior. After inspecting the interior of the house and the attached garage, the captain concluded that the fire had been intentionally set, it had originated inside the garage, and an accelerant had been used.

A video played for the jury showed that the house's garage door had "pulse[d]." Captain Chua explained that the pulse occurred when the fuel was ignited, similar to when "too much lighter fluid [is put] on the barbecue when starting a fire." He stated, "The reason [that] you see the garage pulse is because of that pressure front, that wave of energy," which "hits the garage door" and pushes it "out a little bit." When the wave hits the garage door, it sounds like "a little tiny bang or [an] explosion-type of effect." In his opinion, the most likely ignition source was "an open flame-type of device, like a match or a lighter."

The video played for the jury showed a second pulse. Captain Chua explained that the second pulse was a "flame-over" caused by the gases and heat rising to the overhead ceiling and the fire reaching the temperature at which "all of the gases and fuel at the top ignite[d] at the same time." When that occurred, the "top portion" of the garage door pulsed out.

At trial, T. recalled seeing, the night before the fire, a dark Mustang in front of the "next house over," which was "pretty unusual."

C. had spent the night before the house fire with a male friend in Gilroy. She had not told her sons, any friend, or anybody else that she was going to Gilroy. When C. returned to her home in the morning, she saw her house burning.

On December 29, 2014, Lauren Erickson, a detective with the San Jose Police Department, assisted with the investigation of the residential fire on Bouveron Court. She arrived at the scene at approximately 1:00 p.m. and spoke to C. Detective Erickson was examining C.'s cell phone to see who had contacted her the previous day when the

phone began receiving incoming text messages from a number that C. did not recognize. The new text message read: "How was [G]ilroy, already spreading your legs for the next guy, you are such a motherfucking slut." The message, which the detective showed her, made C. nervous because she had not told anybody that she was going to Gilroy and somehow the sender knew. The next message, coming in only minutes later from the same phone number, read: "You were fucking around, you thought I didn't know, I know when I was fucking you. . . ."

C. received a string of messages with the same accusatory and angry tone. The sender referred to C. by her Vietnamese name. One message asked C. by her Vietnamese name how much she was charging John to "fuck" her. Other messages inquired whom she was "fucking" for money in Gilroy and asked, "Jonh????" John was a friend whom C. knew from a previous workplace and had seen a couple of times. The messages suggested to C. that somebody was following her. C. had previously told defendant about her relationship with John, which had made defendant mad. The police eventually realized that the sender was defendant because he was calling her by her given Vietnamese name.

C. allowed the police to temporarily take her cell phone and upload its contents. Text messages from various phone numbers and an audio file from October 26, 2013 were retrieved.

John Figone, a police officer with the San Jose Police Department, began investigating defendant on December 29, 2015. Officer Figone interviewed defendant on the evening of January 14, 2015, after his arrest. The officer asked defendant where he had been on December 29, 2014, the date of the residential arson. Defendant stated that he had been staying at 3721 Senter Road on that date.

On or about January 23, 2015, Officer Tang showed C. a portion of a surveillance video taken by a neighbor on Bouveron Court on the date her house had burned down. C. was unable to identify the man in the video.

Enhanced video images taken from the surveillance video were admitted at trial. Those images showed (1) a man who was carrying a red gas can, running across the lawn and (2) a black sedan with silver or off-white bumpers driving away.

In March 2015, Officer Tang took photographs in front of 3721 Senter Road, the address where defendant had claimed to be staying on the date of the arson of C.'s house. The photographs showed a black Mustang with silver or off-white bumpers parked in the driveway of that address. The vehicle was registered to someone other than defendant. The black Mustang in the photographs appeared similar to the vehicle seen at the scene of the arson of C.'s house in the enhanced video images.

At trial, C. was shown enhanced video images related to the residential arson, and she identified defendant as the man running across the lawn with the gas can.

The Arson of C.'s Car

C. lost almost everything in the house fire. She put some jewelry, books, and belongings that had survived the fire into her car, a silver Lexus RX SUV. Her things filled about half of the car.

C. and her younger son, T., moved in with her mother, who lived in an apartment for seniors. Her older son stayed with a friend.

Defendant had been to the home of C.'s mother. Defendant was also familiar with her car. He had driven the Lexus while she had been in Vietnam, and he had continued to use it after she had come back as well, sometimes driving the car and dropping her off at work or school.

On January 13, 2015, C. received a text message from defendant's phone number, which read, "I have a good feeling you [are] going to call me tomorrow!!!"

On January 14, 2015, in the early morning hours, C. heard a loud sound, like an explosion, outside her mother's home. C. and T., who was also there, went to the window, and they saw that C.'s Lexus, which was parked at the senior apartment complex, was on fire. C. and T. ran out and shouted for help from neighbors, a couple of

whom ran out to help. They tried to put the fire out with water in buckets. The fire department arrived.

The manager of the senior apartment complex arrived for work after the fire at about 8:30 a.m. The manager provided surveillance videos to police.

Surveillance videos taken by two different cameras at the senior complex and enhanced images from those videos were admitted into evidence at trial. Surveillance camera No. 3 rotated and recorded different views. A video from that camera showed C.'s car in a parking space in front of the recreational hall at almost 1:00 a.m. on January 14, 2015.

A video taken by the other camera showed a white or yellow Volkswagen (VW) Beetle entering the senior apartment complex and driving into parking space No. 169 at 1:14 a.m. on January 14, 2015. On that video, two men can be seen exiting the VW Beetle and walking in the direction of the victim's car. The video taken by camera No. 3 showed two men passing in front of the recreational hall in front of C.'s car minutes later. That video showed a fire breaking out in the car, the vehicle in flames, people trying to put out the fire, and a fire truck arriving on the scene at 1:32 a.m.

At the time of the car fire, C. was working five hours a day, five days a week at a doctor's office, where she worked at the front receptionist desk, answered phones on the Vietnamese line, and scheduled appointments. C. was attending a medical assistant program at the same time.

At 6:26 p.m. on the day of the car fire, C. received another text message from a phone number used by defendant. It used her Vietnamese name and read, "How are you . . . ? Still going to class and work[?] Hope you are well!"

At trial, Thanh N., who testified under a grant of use immunity, recognized defendant. Defendant had stolen his car. Thanh had met defendant at the creek where Thanh had been living, close to the Denny's on Capitol Expressway. Thanh had been

homeless and unemployed at that time. He and defendant had hung out together for a couple of days or so and stayed in Thanh's car.

In a surveillance video played in court, Thanh recognized defendant as the person getting out of the driver's seat of the VW Beetle that had pulled into a parking spot and an individual named Hai as the person getting out of the passenger seat. Thanh had seen Hai every day at the creek. Later in the same video, movement could be seen in the backseat of the car. Thanh indicated that the movement was him and that he had been lying down in the backseat because he had hurt his hand trying to break the window of the Lexus.

Thanh testified that defendant had asked for Thanh's help in burning the Lexus and indicated that he would share with Thanh the money that he was going to get paid for doing it. When Thanh initially tried to break the Lexus's window, he had lighter fluid or gasoline and a lighter or a match. According to Thanh, after he hurt his hand, the three of them left the parking lot and then returned. Thanh let defendant drive his car because his hand hurt. Thanh remained in the backseat of the car, and defendant and Hai went to do the job. They returned minutes later.

Afterward, sometime after 1:00 a.m., Thanh went to the Denny's with defendant and Hai. Defendant said that he would go get money to pay for the food, and Thanh gave the keys to his car to defendant. Defendant left and never returned. Thanh had not seen his car or defendant again.

Thanh testified that the following morning he had walked to an office where defendant had said the Lexus SUV driver worked and asked for the person who drove that car. At trial, Thanh claimed that he had done that in hopes of locating defendant and his own car. Thanh returned to the office a second time and left a note in Vietnamese for the vehicle's owner, giving his name and phone number and asking for the owner to call him. The note was admitted into evidence.

On cross-examination, Thanh admitted that he was using crack cocaine around the time of the arson of the Lexus and that at the time of trial he was on probation for possession of narcotics. He acknowledged that on December 13, 1989, he was convicted of felony commercial burglary and that on April 26, 1994, he was convicted of felony residential burglary.

Fire Captain Chua assisted in the investigation of the Lexus fire on January 14, 2015. Under his direction, the burned vehicle was placed under an "arson hold" and the police department towed it to a "secured impound facility for investigation later that day." At approximately 10:30 a.m. that day, the captain systematically examined the vehicle's exterior and determined that the fire began in its interior and extended out from there. The vehicle was packed almost to its ceiling with personal belongings. In Fire Captain Chua's opinion, the fire was intentionally set, and it originated in the right, rear passenger area.

Defendant's Arrest and Search of Vehicle

Officer Figone was the lead investigator following up on the car fire. Detective Erickson became involved at about 4:00 or 5:00 p.m. on January 14, 2015. A decision was made to "ping" defendant's cell phone based upon "the severity of what had been going on." The phone company was contacted, the police briefly described the danger to life that they believed existed, and the phone company began sending GPS location information every 15 minutes to the email address provided by the police. This was the one and only time in her career that Detective Erickson had used the process of "pinging" a cell phone with the assistance of the service provider.

Based upon the initial location information of defendant's cell phone, the police went to the area of the intersection of Capitol Expressway and Snell. After approximately an hour or an hour and a half of driving around, the police found defendant in "a white VW Beetle with a black front bumper and side fenders" on Bluefield Court.

During defendant's arrest on January 14, 2015, an iPhone was found near the center console or on the front passenger seat of the vehicle, and a "flip phone" was found on the backseat. The iPhone was passed to Officer Figone so he could book it into evidence, which he did. That phone, identified as a black and silver Apple iPhone 3GS, was later analyzed in the Santa Clara County District Attorney's Crime Laboratory.

Willis from the crime laboratory downloaded and analyzed the contents of the black and silver Apple iPhone 3GS. A note on the phone, dated January 4, 2015, read, "Text Monday Go Finish the Job A Must." It was stipulated that January 4, 2015 was a Sunday. A Web search had been conducted on that iPhone during the afternoon of Wednesday January 14, 2015 using the terms "san jose car fire on january 14 2015"

Officer Figone interviewed T.K. on January 14, 2015. The officer was told that defendant had previously contacted T.K. from a variety of phone numbers, which T.K. provided.

Telephone Calls to T.K. from Santa Clara County Jail

At trial, Veronica Flores, who was administrative deputy with the Santa Clara County Department of Corrections Sheriff's Office and the custodian of records for all jail calls coming out of the Santa Clara County Jail, testified. Flores stated that between January 14, 2015—when defendant was incarcerated—and March 4, 2015, three calls were made to T.K.'s phone number by an inmate using a CEN number not belonging to defendant. Although no outgoing calls were made during that period using defendant's CEN number, an inmate could use someone else's CEN number when making calls.

The Acid Attack on C.

On March 4, 2015, a woman, who sounded like a "native English speaker," called the doctor's office in which C. worked on the Vietnamese line. The caller asked whether C. was there, using C.'s Vietnamese name. C., who answered the phone, said yes. About 10 or 15 minutes later, a woman, who was wearing a hood and large, "very dark glasses,"

walked into the lobby of the doctor's office. C. thought the woman, whom she had never seen before, was about 5 feet 4 or 5 inches tall, approximately 30 years old, and white.

The woman walked to the small reception window where C. was located and, using C.'s Vietnamese name, asked two or three times whether she was C. C. was having a hard time hearing the woman because she was speaking in a "very low voice like mumbling." C. thought the woman was very sick and needed help and she went out to the lobby to speak to her. Out in the lobby, C. asked how she could help. The woman asked again whether she was C., this time using her complete Vietnamese given name and last name. When C. said yes, the woman asked the same question again, and C. said yes again. The woman then opened a metallic Starbucks coffee cup that she was holding and splashed her with a liquid. The liquid hit her face, the top of her head, her chest, and arms.

C. immediately felt her skin, her eyes, and her hair burning and began screaming. C. ran to the bathroom. C. was blinded and could not stand. A coworker ran after C., who told her that the woman had thrown something in her face. C.'s shirt and clothing were melting. Someone called 911.

On March 4, 2015, Thomas Lass, a paramedic and a hazardous materials (hazmat) specialist with the San Jose Fire Department, responded to a doctor's office based on a report that someone had been hit with acid. An unknown substance was splattered on the ground, chairs, and walls and a stainless steel coffee mug was on the floor. When San Jose Police Officer Adam Plares arrived at 3:27 p.m., he saw paramedics treating a woman, who appeared to have severe chemical burns. The clothes that she was wearing appeared to be "disintegrating" and "falling apart." The woman was groaning, having trouble breathing, and appeared to be in a lot of pain. Officer Plares was unable to question her.

Lass collected the substance using a pipette, placed the substance into a sterile jar, ran tests on it, and handed the evidence to a police officer. While standing in the

substance, Lass realized that his boots, which were made from chemical-resistant rubber, were beginning to melt. Lass stepped out of the medical office, and upon examining the boots, "clearly saw that the boots were starting to break down."

Officer Plares took photographs of the scene, which were admitted into evidence. Another San Jose police officer collected evidence at the scene, including two vials containing a clear liquid that the hazmat team had determined was acid. Trevor Gillis, a criminalist with the Santa Clara County crime laboratory, analyzed the liquid in one of the two glass vials and determine it was sulfuric acid.

C. was in the hospital for a month. She had eight or nine surgeries to do skin grafts using skin from her legs on her chest, her arms, and her hands. Her most recent surgery had been on her neck, and it had taken place the month before trial. She had significant scarring on her chest and both arms. She wore makeup to cover the scars on her face and chest. There had been some nerve damage on the right side of her jaw and damage to her eyes. She was on governmental disability.

The direct perpetrator of the March 4, 2015 acid attack on C. had not been identified by the time of trial.

II

Discussion

A. *Motion to Suppress*

1. *Background*

On October 25, 2016, after trial had commenced, defendant filed a motion to suppress the records of the "activities and whereabouts" of his cell phone, which the government had obtained from his service provider without a warrant, and any derivative evidence. (See § 1538.5)

At the hearing on the motion the following day, Officer Figone testified that on December 29, 2014, he assisted with the investigation of a residential arson.

Approximately two weeks, later on January 14, 2015, the officer assisted with the investigation of a car fire. C. was the victim of both fires.

On December 29, 2014, Officer Figone and Detective Erickson interviewed C. The officers were given access to C.'s cell phone, and they saw a text message the victim received on her phone that referred to C.'s having been in Gilroy the previous night. C. confirmed that she had been in Gilroy the night before, and she said that she had not told anyone, not even her sons.

On January 14, 2015, Officer Figone began his shift at approximately 7:00 a.m. Before lunch, the officer received a telephone call concerning the car fire from an arson investigator with the San Jose Fire Department. Before lunch, Officer Figone spoke to C., who expressed concern for her safety in that she had been the target of another attack.

During the afternoon of January 14, 2015, Officer Figone and two other officers met with C. in person due to "the severity of the incident and the prior arson." C. was "afraid, scared, anxious" and felt that "her life was in danger." C. indicated that she had received a text message from someone who she believed was involved in the car fire. In addition, someone had called her workplace while she was not there and asked for the owner of the Lexus—the car that had burned—and later in the day a Vietnamese male had shown up at her workplace asking for the owner of the Lexus. This man had left a note asking the owner to contact him.

Officer Figone then went to the doctor's office where the victim worked and spoke to two employees. The officer learned that the Vietnamese male who had gone to the victim's workplace was not defendant, whom those employees had previously met. C.'s coworkers had told C. that the man claimed that defendant had taken his car the previous night and not returned it to him.

Afterward, Officer Figone went to the location of the car fire and then returned to his office, where he contacted and spoke to T.K., who he believed was defendant's ex-wife. Later that day, Officer Figone received a call from C., who told him that she

had been sent a text message asking something along the lines of, "Why are the pigs bothering my family?"

The police offered community services to C. to enable her to get to "a safe place in light of the exigent circumstances." Officer Figone updated Detective Erickson and his supervisor on the case. At that point, the "first and foremost goal" of the police department was to get C. to a safe place, and they were actively working toward that goal.

Community Solutions, an organization that assists victims of violence with housing and other services, indicated that it would take C. based on the circumstances, even though it was full. C. was "really scared," but she did not want to leave her family or her mother's house. The law enforcement team decided to contact the service provider for defendant's cell phone. They opted not to obtain a warrant based on the totality of the circumstances, which had led the officers to think that defendant was actively pursuing C. and that they needed to get defendant into custody. But at the hearing on the suppression motion, Detective Erickson acknowledged that there was a "night judge" from whom a search warrant could have been obtained.

Detective Erickson contacted AT&T, the service provider for a phone number believed to be defendant's, on its law enforcement line. Although the text message sent to C. that day came from a different phone number, C. told the officers that defendant used "different numbers all the time" and that when she received incoming calls or text messages from unknown numbers, she suspected that they were from him.
Detective Erikson informed the AT&T representative that the police were working on a case involving an actual imminent threat to life and requested the coordinates of the defendant's cell phone. This was the only time in her career that Erickson had used that procedure.

After Detective Erickson's conversation with AT&T, AT&T advised her that it would send the cell phone's coordinates every 15 minutes and asked for an email address. Officer Figone's email address was provided to AT&T.

The first set of GPS coordinates received by Officer Figone generally corresponded to the intersection of Capitol and Snell. But the location kept moving, and the officers continued to drive around and look for defendant. Defendant was located within an hour or an hour and a half of the time the officers arrived at Capitol and Snell.

The officers were searching for a white VW Beetle with a distinctive black fender and front bumper, which was a suspect vehicle in the car fire case. When found, defendant was seated in the driver's seat of that vehicle, which was parked in a public place. The vehicle had not yet been reported stolen to police.

Earlier that day, Officer Figone had spoken with defendant's probation officer in San Bernardino County. The probation officer had told Officer Figone that defendant had absconded and a warrant for his arrest was being obtained. At the time defendant was located, there was an outstanding warrant for defendant's arrest. Officer Figone and Detective Erickson participated in the arrest of defendant, which occurred in the "evening after 8:00 or 9:00 o'clock at night" on January 14, 2015.

The day following the evidentiary portion of the hearing on the motion to suppress, the trial court considered the parties' arguments. The prosecutor contended that the motion was untimely. On the merits, he argued that a person has no reasonable expectation of privacy in information voluntarily disclosed to third parties and that "the geolocation that emanates from a person's cell phone is [not] any different from the numbers dialed on a phone or an IP address."

Defense counsel asserted that "there is a heightened expectation of privacy in . . . real-time tracking, which is comparable to when police officers use real-time GPS tracking of a motor vehicle . . . ." He also argued that the evidence was insufficient to objectively show that there were exigent circumstances that justified a warrantless search

because defendant was "coming . . . right then and there." The People maintained that the victim was threatened with imminent injury, which established exigent circumstances.

The trial court denied the motion to suppress. It explained that it had found that defendant "did not have an expectation of privacy in the location transmitted by [the] GPS coordinates transmitted through his phone" and that therefore no Fourth Amendment violation had occurred. The court further determined that if there had been such a violation, suppression of evidence was not the proper remedy. It concluded that it was unnecessary to reach the prosecutor's exigent circumstances argument, but nevertheless commented that although "there was exigency," a warrant could have been "obtained in a timely manner."

2. *Standard of Review*

"In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. [Citation.]" (*People v. Thompson* (2010) 49 Cal.4th 79, 111 (*Thompson*).) "A warrantless search is presumed to be [constitutionally] unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. [Citation.]" (*People v. Redd* (2010) 48 Cal.4th 691, 719 (*Redd*).)

"We review the court's resolution of the factual inquiry under the deferential substantial evidence standard." (*Thompson*, *supra*, 49 Cal.4th at pp. 111-112.) Thus, " '[w]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence. . . .' [Citations.]" (*Redd*, *supra*, 48 Cal.4th at p. 719, fn. omitted.) But " '[i]n determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]' [Citations.]" (*Ibid*.)

3. *Fourth Amendment Principles*

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)." (*Horton v. California* (1990) 496 U.S. 128, 133.) Ordinarily, "[a] 'search' occurs 'when an expectation of privacy that society is prepared to consider reasonable is infringed.' *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)." (*United States v. Karo* (1984) 468 U.S. 705, 712 (*Karo*); cf. (*United States. v. Jones* (2012) 565 U.S. 400, 415-416 (*Jones*).)

The reasonable-expectation-of-privacy standard of *Katz v. United States* (1967) 389 U.S. 347 (*Katz*) establishes that even if the government does not trespass on private property, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. [*Katz*,] at 361 [(Harlan, J., concurring)]." (*Kyllo v. United States* (2001) 533 U.S. 27, 33 (*Kyllo*); see *id*. at pp. 34-35 [use of thermal-imager to detect heat emanating from a home constituted a search within the meaning of the Fourth Amendment].) Contrariwise, "a Fourth Amendment search does *not* occur—even when the explicitly protected location of a *house* is concerned—unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.' [Citation.]" (*Id*. at p. 33; see *California v. Ciraolo* (1986) 476 U.S. 207, 213-214 [naked-eye aerial observation from an altitude of 1,000 feet of marijuana growing in a backyard within the curtilage of a home does not constitute a search under the Fourth Amendment].) In general, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations.]" (*Katz, supra,* at p. 351.) "[M]ore recent Fourth Amendment cases have clarified that the test most often associated with legitimate expectations of privacy, which was derived

from the second Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967), supplements, rather than displaces, 'the traditional property-based understanding of the Fourth Amendment.' *Florida v. Jardines*, 569 U.S. 1, 11 (2013)." (*Byrd v. United States* (2018) 584 U.S. __, __ [138 S.Ct. 1518, 1526].)

The Supreme Court has held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. [Citations.]" (*Smith v. Maryland* (1979) 442 U.S. 735, 743-744 (*Smith*).) In *United States v. Miller* (1976) 425 U.S. 435 (*Miller*), a seminal third-party case, the Supreme Court concluded that Miller, who was being investigated for tax evasion and whose bank records had been subpoenaed, could "assert neither ownership nor possession" of those records because they were "the business records of the banks," not his private papers. (*Id.* at p. 440.)

In *Smith*, the Supreme Court held that "the Government's use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a search." (*Carpenter v. United States* (2018) 585 U.S. at p. __, __ [138 S.Ct. 2206, 2216] (*Carpenter*).) "Noting the pen register's 'limited capabilities,' the Court 'doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial.' 442 U.S., at 742. Telephone subscribers know, after all, that the numbers are used by the telephone company 'for a variety of legitimate business purposes,' including routing calls. *Id.*, at 743. . . . When Smith placed a call, he 'voluntarily conveyed' the dialed numbers to the phone company by 'expos[ing] that information to its equipment in the ordinary course of business.' *Id.*, at 744 (internal quotation marks omitted)." (*Ibid.*) The Supreme Court "held that the defendant 'assumed the risk' that the company's records 'would be divulged to police.' *Id.*, at 745." (*Ibid.*)

4. *Carpenter Holds Third-Party Doctrine Not Applicable to Historical CSLI*

In *Carpenter, supra,* 585 U.S. at p. __ [138 S.Ct. at p. 2219], a suspect in a series of robberies "identified 15 accomplices who had participated in the heists and gave the

FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies." (*Id*. at p. __ [138 S.Ct. at p. 2212].) "Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects. That statute, as amended in 1994, permit[ed] the Government to compel the disclosure of certain telecommunications records when it 'offers specific and articulable facts showing that there are reasonable grounds to believe' that the records sought 'are relevant and material to an ongoing criminal investigation.' 18 U.S.C. § 2703(d). Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose 'cell/site sector [information] for [Carpenter's] telephone[ ] at call origination and at call termination for incoming and outgoing calls' during the four-month period when the string of robberies occurred. . . . The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was 'roaming' in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day." (*Ibid*.)

In *Carpenter*, the United States Supreme Court declined to extend *Smith* and *Miller* "to the collection of CSLI." (*Carpenter*, *supra*, 585 U.S. at p. __ [138 S.Ct. at p. 2220].) The court noted that "when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements." (*Id*. at p. __ [138 S.Ct. at p. 2217].) It observed: "Unlike the nosy neighbor who keeps an eye on comings and goings, [wireless carriers] are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle

of location information casually collected by wireless carriers today." (*Id*. at p. __ [138 S.Ct. at p. 2219].) It concluded that "[g]iven the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter's claim to Fourth Amendment protection." (*Id*. at p. __ [138 S.Ct. at p. 2220].)

As *Carpenter* pointed out, "the nature of [Miller's Bank] records confirmed Miller's limited expectation of privacy, because the checks were 'not confidential communications but negotiable instruments to be used in commercial transactions,' and the bank statements contained information 'exposed to [bank] employees in the ordinary course of business.' [Citation.]" (*Carpenter, supra*, 585 U.S. at p. __ [138 S.Ct. at p. 2216].) In *Miller*, the Supreme Court "concluded that Miller had 'take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government.' [Citation.]" (*Ibid*.)

In *Carpenter*, the Supreme Court recognized that the "third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another." (*Carpenter, supra*, 585 U.S. at p. __ [138 S.Ct. at p. 2219].) The court concluded that the rationale of voluntary exposure, which underlies the third-party doctrine, does not "hold up when it comes to CSLI." (*Id*. at p. __ [138 S.Ct. at p. 2220].) "Cell phone location information is not truly 'shared' as one normally understands the term. In the first place, cell phones and the services they provide are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society. *Riley* [*v. California*] (2014)] 573 U.S. [373, 385]. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no

way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily 'assume[ ] the risk' of turning over a comprehensive dossier of his physical movements. *Smith*, 442 U.S., at 745." (*Ibid.*)

Although *Carpenter* was concerned exclusively with historical CSLI, not real-time CSLI, and the court stated that it was expressing no view on real-time CSLI (*Carpenter*, *supra*, 585 U.S. at p. __ [138 S.Ct. at p. 2220]), *Carpenter*'s reasoning as to the third-party doctrine applies equally to real-time CSLI given how that information is generated. Furthermore, the application of third-party doctrine would make even less sense if a wireless carrier produced real-time CSLI only at the behest of law enforcement and not for its own use or business records.

In light of *Carpenter*, we do not hold that defendant lacked a reasonable expectation of privacy in his cell phone's CSLI because he "shared" that information with his wireless carrier.

5. *Carpenter* and the *Reasonable Expectation of Privacy in Historical CSLI*

As the United States Supreme Court recognized in *Carpenter*, "seismic shifts in digital technology" have made it possible to track the cell site location information of anyone's location for any length of time. (See *Carpenter*, *supra*, 585 U.S. at p. __ [138 S.Ct. at p. 2219].) "[C]ell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools." (*Id*. at p. __ [138 S.Ct. 2217-2218].) Traditional or conventional surveillance requires the investment of limited resources, such as personnel, time, vehicles or aircraft, equipment, and money. Justice Sotomayor's observation regarding GPS surveillance in her concurring opinion in *Jones* is equally true for cell phone tracking: "GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.' *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)." (*Jones*, *supra*, 565 U.S. at pp. 415-416 (conc. opn. of Sotomayor, J.).)

The Supreme Court in *Carpenter* recognized that "a cell phone—almost a 'feature of human anatomy,' *Riley*, 573 U.S., at [385]—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. See *id*., at [395] (noting that 'nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower'); contrast *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion) ('A car has little capacity for escaping public scrutiny.'). Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." (*Carpenter*, *supra*, 585 U.S. at p. __ [138 S.Ct. 2218].)

In *Carpenter*, the United States Supreme Court stated: "Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.' *Carroll v. United States*, 267 U.S. 132, 149 (1925). On this score, [the United States Supreme Court] cases have recognized some basic guideposts. First, that the Amendment seeks to secure 'the privacies of life' against 'arbitrary power.' [Citation.] Second, and relatedly, that a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.' [Citation.]" (*Carpenter*, *supra*, 585 U.S. at p. __ [138 S.Ct. at pp. 2213-2214], fn. omitted].)

In deciding whether Carpenter had a reasonable expectation in his historical CSLI, the United States Supreme Court considered two landmark cases concerned with surveillance using technology. "In *United States v. Knotts*, 460 U.S. 276 (1983), [the United States Supreme Court] considered the Government's use of a 'beeper' to aid in tracking a vehicle through traffic. Police officers in that case planted a beeper in a

container of chloroform before it was purchased by one of Knotts's co-conspirators. The officers (with intermittent aerial assistance) then followed the automobile carrying the container from Minneapolis to Knotts's cabin in Wisconsin, relying on the beeper's signal *to help keep the vehicle in view*. The Court concluded that the 'augment[ed]' visual surveillance did not constitute a search because '[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.' *Id.*, at 281, 282. Since the movements of the vehicle and its final destination had been 'voluntarily conveyed to anyone who wanted to look,' Knotts could not assert a privacy interest in the information obtained. *Id.*, at 281." (*Carpenter*, *supra*, 585 U.S. at p. __ [138 S.Ct. at p. 2215], italics added.)

In *Jones*, *supra*, 565 U.S. 400, "FBI agents installed a GPS tracking device on Jones's vehicle and remotely monitored the vehicle's movements for 28 days." (*Carpenter*, *supra*, 585 U.S. at p. __ [138 S.Ct. at p. 2215].) The United States Supreme Court determined in *Jones* that "the attachment of a Global–Positioning–System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets" (*Jones*, *supra*, at p. 402) constituted a search. (*Id*. at p. 404.)

Justice Sotomayor in her concurring opinion in *Jones* agreed that "a search within the meaning of the Fourth Amendment occurs, at a minimum, '[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area.' " (*Jones*, *supra*, 565 U.S. at p. 413 (conc. opn. of Sotomayor, J.).) But she voiced concerns that in cases involving short-term GPS monitoring, "some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention" because "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. [Citation.]" (*Id*. at p. 415.)

In *Carpenter*, the United States Supreme Court noted that "five Justices [in *Jones* had] agreed that related privacy concerns would be raised by, for example, 'surreptitiously activating a stolen vehicle detection system' in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone. [*Jones*, *supra*, 565 U.S.] at 426, 428 (Alito, J., concurring in judgment); *id*., at 415 (Sotomayor, J., concurring). Since GPS monitoring of a vehicle tracks 'every movement' a person makes in that vehicle, the concurring Justices concluded that 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy'—regardless whether those movements were disclosed to the public at large. *Id*., at 430 (opinion of Alito, J.); *id*., at 415 (opinion of Sotomayor, J.)." (*Carpenter*, *supra*, 585 U.S. at p. __ [138 S.Ct. at p. 2215.)

The Supreme Court concluded in *Carpenter* that accessing seven days of historical CSLI, which provided a record of Carpenter's past physical movements, constituted a Fourth Amendment search. (*Carpenter*, *supra*, 585 U.S. at p. __ & fn. 3 [138 S.Ct. at p. 2217 & fn. 3].) The court held that "[w]hether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, . . . an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [historical] CSLI." (*Id*. at p. __ [138 S.Ct. at p. 2217].) The court declined to "decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be."[6] (*Id*. at p. __, fn. 3 [138 S.Ct. at p. 2217, fn. 3].)

In reaching its conclusion in *Carpenter*, the Supreme Court observed: "A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. *Jones*, 565 U.S., at 430 (Alito, J., concurring in judgment); *id*., at 415 (Sotomayor, J., concurring). Prior to the digital age,

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[6] In *Carpenter*, "the Government treat[ed] the seven days of CSLI requested from Sprint as the pertinent period, even though Sprint produced only two days of records." (*Carpenter*, *supra*, 585 U.S. at p. __, fn. 3 [138 S.Ct. at p. 2217, fn. 3].)

law enforcement might have pursued a suspect for a brief stretch, but doing so 'for any extended period of time was difficult and costly and therefore rarely undertaken.' *Id*., at 429 (opinion of Alito, J.). For that reason, 'society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.' *Id*., at 430." (*Carpenter*, *supra*, 585 U.S. at p. __ [138 S.Ct. at p. 2217].) In contrast, the advancement of technology had resulted in CSLI, which was "detailed, encyclopedic, and effortlessly compiled." (*Id*. at p. __ [138 S.Ct. at p. 2216].)

The Supreme Court in *Carpenter* further concluded that "the Government must generally obtain a warrant supported by probable cause before acquiring [historical CSLI] records." (*Carpenter*, *supra*, 585 U.S. at p. __ [138 S.Ct. at p. 2221.) A court order issued under the Stored Communications Act did not suffice. (See *ibid*.) The court stated: "Although the 'ultimate measure of the constitutionality of a governmental search is "reasonableness," ' our cases establish that warrantless searches are typically unreasonable where 'a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.' [Citation.] Thus, '[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.' [Citation.]" (*Ibid*.)

The court explained: "[E]ven though the Government will generally need a warrant to access [historical] CSLI, case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances. 'One well-recognized exception applies when " 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." ' [Citation.] Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. [Citation.]" (*Carpenter*, *supra*, 585 U.S. at p. __ [138 S.Ct. at pp. 2222-2223.) "As a result, if law enforcement is confronted with an

urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances." (*Id*. at p. __ [138 S.Ct. at p. 2223].)

6. *Contemporaneous Use of Real-Time CSLI*

As indicated, *Carpenter* explicitly limited its decision to historical CSLI for a period of at least seven days. The circumstances of this case are readily distinguishable from *Carpenter*.

In this case, the government was using real-time CSLI, rather than historical CSLI records. In addition, the government was not looking for incriminating CSLI to corroborate a suspect's involvement in the crimes being investigated. Rather, police officers were searching for defendant. Defendant had absconded from probation in another area of California, and there was a warrant out for his arrest. In addition, defendant was a suspect in two arsons targeting the same female victim, one of which had occurred the previous night, and based on evolving information, the investigating law enforcement officers believed that he was actively pursuing her and were profoundly concerned for her safety.

The real-time CSLI did not pinpoint defendant's location, it merely aided the officers' search for him by providing the vicinity of his cell phone. Using the CSLI as a proxy for information regarding defendant's vicinity, the officers drove around for approximately an hour to an hour and a half looking for defendant in a white VW Beetle with a black fender and front bumper, which was the suspect vehicle in the apparent arson of C.'s car. Defendant was found in the driver's seat of that vehicle, which was parked in a public place, and he was arrested pursuant to a warrant.

Under these narrow circumstances, we conclude that defendant did not have a legitimate expectation of privacy, i.e., one that society is prepared to recognize as

reasonable, in the real-time CSLI that was accessed by law enforcement for a brief period—approximately an hour and a half—as an aid in visually locating him on public streets and arresting him pursuant to a warrant. We stress the very limited nature of our conclusion.

Defendant was in a car on public roads, and the car and he were visible to the law enforcement officers who were looking for him and the VW Beetle, which was suspected to have been involved in the car fire. He had no reasonable expectation of privacy in his real time location or movements in a vehicle on public streets. (See *United States v. Knotts*, *supra*, 460 U.S. at p. 281 ["A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."]; *Cardwell v. Lewis* (1974) 417 U.S. 583, 590-591 ["A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both occupants and its contents are in plain view. [Citation.] 'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.' [Citations.]"].)

We have not decided that obtaining real-time CSLI is never a search or that real-time CSLI can be used to track a cell phone, and presumably its user, into a private home or business. (Cf. *United States v. Karo* (1984) 468 U.S. 705, 714 [law enforcement's monitoring of a beeper, which had been installed on can of ether with the owner's consent before its transfer to a suspected drug trafficker, inside "a private residence, a location not open to visual surveillance, violate[d] the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence"].) Neither have we suggested that use of real-time CSLI to conduct surveillance of an individual over a more extended period would not constitute a search. As Justice Sotomayor cautioned in *Jones*, "Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result

is that GPS [or CSLI] monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may 'alter the relationship between citizen and government in a way that is inimical to democratic society.' [Citation.]" (*Jones, supra,* 565 U.S. at p. 416 (conc. opn. of Sotomayor, J.).)

In light of our conclusion that law enforcement's very brief access to, and contemporaneous use of, defendant's real-time CSLI to help visually locate him and arrest him on public streets was not a search, we have no occasion to decide whether the evidence adduced at the suppression hearing demonstrated the existence of the exigent circumstances that qualified as an exception to the warrant requirement.[7]

B. *Admission of the Audio Recording of Defendant's Conversation with C.*

Defendant maintains that the trial court should have excluded the audio recording of his conversation with C. on October 26, 2013. C. made the recording using her cell phone without defendant's consent. He asserts that the admission of that recording violated section 632, subdivision (d), and his due process rights, and that the erroneous admission was not harmless.

[7] We also find it unnecessary to consider the People's new argument that the good-faith exception to the Fourth Amendment exclusionary rule applied because it was objectively reasonable for Officer Erickson to rely on section 2702, subdivision (c)(4), of the Stored Communications Act (18 U.S.C., § 2701 et seq.). (See *Illinois v. Krull* (1987) 480 U.S. 340, 346-355 [a good-faith exception to the Fourth Amendment exclusionary rule applies when an officer's reliance on the constitutionality of a statute is objectively reasonable but the statute is subsequently declared unconstitutional].) That provision of the Stored Communications Act states that an electronic communication service provider "may divulge a record or other information pertaining to a subscriber to or customer of such service" "to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency." Generally, the People may not raise a new theory on appeal to justify the trial court's denial of a motion to suppress. (See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.)

The People recognize that section 632 prohibits the recording of confidential communications, but they assert that the recording in this case comes within the statutory exemption of section 633.5 because C. recorded the conversation to obtain evidence of extortion. They further maintain that the Truth-in-Evidence provision of the California Constitution (Cal. Const., art. I, § 28, subd. (f)(2) (formerly subd. (d)) "abrogated section 632, subdivision (d), to the extent it purports to exclude relevant evidence in a criminal proceeding . . . ."[8] They also contend that in any case, any error in admitting the recording did not constitute a deprivation of due process and any state law error was harmless.

1. *Background*

The prosecution brought a motion in limine to admit a 56-minute recording of a conversation between C. and defendant on October 26, 2013. It was argued that although the recording was made without defendant's consent, it was admissible under section 633.5 because "it was made for the purpose of obtaining evidence reasonably believed to relate to the crimes of extortion and other felonies involving violence against the person."

[8] This issue is presently pending before the California Supreme Court in *People v. Guzman* (2017) 11 Cal.App. 5th 184, review granted July 26, 2017, 242244. The case presents the following issue: "Does the 'Right to Truth-in-Evidence' provision of the California Constitution (art. I, § 28, subd. (f)(2)) abrogate Penal Code section 632, subdivision (d), which otherwise mandates the exclusion of recorded confidential communications from evidence in criminal proceedings?" (<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2201542&doc_no=S242244&request_token=NiIwLSIkTkw%2BWyBVSCJNWElIIEg0UDxTJyI%2BTz5SMCAgCg%3D%3D>[as of Mar. 25, 2019].) The "Right to Truth-in-Evidence" provision of the California Constitution, which was added by an initiative measure approved by voters in 1982, states in pertinent part: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . . ." (Cal. Const., art. I, § 28, subd. (f)(2).)

C. testified at a hearing held pursuant to Evidence Code section 402. She had recorded the conversation that took place in defendant's car with her cell phone to protect herself and her family. She indicated that she was trying to get defendant to talk about some of his activities. Defendant had spoken about the motorcycle incident involving her son, robbing a "memory chip" company, and his blackmailing of a married woman based on photographs of her while naked. Defendant also had spoken about his plan to rob a football bookie during this conversation, but at the time of the hearing C. was not sure whether she knew about that plan before she recorded the conversation. At the time of the recording, C. was concerned that defendant might be trying to hurt her and her family because defendant had caused her older son to be arrested for theft of a motorcycle, which defendant had purportedly given her son as a gift. Defendant also had had someone write damaging letters to the housing authority, which provided public assistance with her rent. Defendant had claimed that the letters, which detailed conduct by C. and her son, had been intercepted by someone working at the housing authority and given to him. She had not been thinking that defendant would physically hurt her. When she recorded the conversation, she had no plans to turn over the recording to the police, and she had never told the police that she had the recording.

At the hearing, the prosecutor cited *People v. Ayers* (1975) 51 Cal.App.3d 370 (*Ayers*) and argued that the admissibility of a recording depended upon its content, not on the mental state of the person doing the recording. The trial court ruled that the recording was admissible in evidence, but that upon request, it would give a limiting instruction that the jury could consider the recording only as evidence of motivation.[9]

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[9] The trial court did in fact instruct the jury that the evidence regarding theft of a motorcycle, robbery of computer chip companies, and conspiracy to commit robbery of a sports bookie was relevant to motive and that the evidence regarding blackmail/extortion of T.T. was relevant to motive and impeachment. The court directed the jury not to consider the evidence for any other purpose and not to "conclude from this evidence that the defendant has a bad character or is disposed to commit crime."

2. *Governing Law*

"The California Invasion of Privacy Act (§ 630 et seq.) was enacted in 1967, replacing prior laws that permitted the recording of telephone conversations with the consent of one party to the conversation. [Citation.] The purpose of the act was to protect the right of privacy by, among other things, requiring that all parties consent to a recording of their conversation." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 768-769.)

Section 632, subdivision (d), provides: "Except as proof in an action or prosecution for violation of this section, evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section is not admissible in any judicial, administrative, legislative, or other proceeding."[10] With certain exceptions, subdivision (a) of section 632 makes it a crime, and at the time of the recording made it a crime, for a person to "intentionally and without the consent of all parties to a confidential communication" record the confidential communication through the use of a recording device. A "confidential communication" is defined as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto." (§ 632, subd. (c).) A communication is not confidential where "the parties to the communication may reasonably expect that the communication may be overheard or recorded." (*Ibid*.)

Under the exemption established by section 633.5, a party to a confidential communication is not prohibited from recording the communication "*for the purpose of obtaining evidence* reasonably believed to relate to the commission by another party to the communication of" specified crimes, including the crime of extortion or "any felony involving violence against the person." (Italics added.) Section 633.5 makes clear that section 632 does not "render any evidence so obtained inadmissible in a prosecution for"

[10] Section 632 was amended effective January 1, 2017; nonsubstantive changes were made to subdivision (d). (Stats. 2016, ch. 855, § 1, pp. 5779-5780.)

specified crimes, including extortion and "any felony involving violence against the person."

In *Ayers*, the defendants were charged with conspiracy to commit murder and soliciting two people to commit murder. (*Ayers*, *supra*, 51 Cal.App.3d at p. 372.) The men who had been solicited "agreed to try to get the money from [one of the defendants] without actually committing the deed," and "[t]hey decided to surreptitiously tape record conversations with [that defendant]." (*Id*. at p. 374.) "Several conversations were recorded in which [one of the defendants] and [one of the men who had been solicited] discussed the details of the proposed murder." (*Ibid*.) Later, one of the men who had been solicited cooperated with the police by surreptitiously recording conversations with the defendants. (*Ibid*.) At trial, seven recordings, three of which had been made under the direction of a law enforcement officer, were admitted into evidence. (*Id*. at pp. 374-375.)

On appeal in *Ayers*, the defendants argued that the four recordings made without police authorization should have been excluded because the "initial purpose" of the men who had been solicited to commit murder was "to gather evidence for their own purposes and not to gather evidence for use in a prosecution." (*Ayers*, *supra*, 51 Cal.App.3d at p. 377.) The appellate court rejected the suggestion that the phrase "for the purpose of obtaining evidence" in section 633.5 should be interpreted to mean for the purpose of instituting a prosecution. (*Ayers*, *supra*, at p. 377.) It observed that the defendant's "interpretation would place the prosecuting authorities at the mercy of the admitted lawbreaker" since the admissibility "of valuable evidence [would] turn on the lawbreaker's articulation of his own state of mind." (*Ibid*.)

The statutory language construed in *Ayers* remains in section 633.5 to this day, even though the section has been amended many times since that case was decided. "It is a settled principle of statutory construction that the Legislature ' "is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a

statute in light thereof. [Citation.]" [Citation.]' (*People v. Yartz* (2005) 37 Cal.4th 529, 538.) Courts may assume, under such circumstances, that the Legislature intended to maintain a consistent body of rules and to adopt the meaning of statutory terms already construed. [Citations.]" (*People v. Scott* (2014) 58 Cal.4th 1415, 1424; see *People v. Meloney* (2003) 30 Cal.4th 1145, 1161.)

3. *Analysis*

There is no dispute that C. recorded a confidential conversation within the meaning of section 632. Defendant maintains that *Ayers* was wrongly decided and that the recording should have been excluded under section 632, subdivision (d). He also argues that the "Truth-in-Evidence" provision of the California Constitution no longer abrogates the exclusionary rule of section 632, subdivision (d), because "the Privacy Act has been amended and re-enacted numerous times with a two-thirds majority of the legislature." (See *ante*, fn. 8.)

We find it unnecessary to resolve the legal questions raised by defendant. We do not agree that any erroneous admission of the recording in violation of section 632, subdivision (d), resulted in violation of defendant's rights to due process.[11]

Relying upon *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347, defendant contends that "California Law guaranteed that a surreptitiously recorded confidential conversation would not be admitted at trial" and thereby "created a due process right to

[11] "To the extent, if any, that defendant may be understood to argue that due process required exclusion of the evidence for a reason different from his trial objection, that claim is forfeited." (*People v. Partida* (2005) 37 Cal.4th 428, 436 (*Partida*).) While a defendant may argue on appeal that an error in admitting evidence over an evidentiary objection under state law had the additional legal consequence of violating due process (*id*. at pp. 435, 438), the reviewing court's "rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well." (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

not putting [*sic*] one's life, liberty, or property in jeopardy in a judicial proceeding due to an illegally obtained recording." Defendant's premise is incorrect.

Even if the trial court erred in admitting the audio recording over defendant's objection pursuant to section 632, subdivision (d), the error is merely a state law error. No United States Supreme Court case, including *Hick*s, establishes that defendants have a constitutionally protected liberty interest in the proper application of state law governing the admission or exclusion of evidence at trial.

As the United States Supreme Court has recognized, "a 'mere error of state law' is not a denial of [federal] due process. [Citation.]" (*Engle v. Isaac* (1982) 456 U.S. 107, 121, fn. 21 (*Engle*).) "If the contrary were true, then 'every erroneous decision by a state court on state law would [be] a federal constitutional question.' [Citations.]" (*Ibid.*) Due process does not safeguard "the meticulous observance of state procedural prescriptions . . . ." (*Rivera v. Illinois* (2009) 556 U.S. 148, 158 (*Rivera*) ["Because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution"]; cf. *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 195 ["violation of section 190.9, subdivision (a)(1), by itself, did not deprive defendants of a 'liberty interest' under *Hicks v. Oklahoma* (1980) 447 U.S. 343"].)

Under California's standard of review generally applicable to state law error, we conclude that any error in admitting the recording pursuant to section 633.5 was harmless. A miscarriage of justice requiring a reversal of a judgment has occurred if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see Cal. Const., art. VI, § 13 ["No judgment shall be set aside . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"].) "[T]he

[*Watson*] test . . . must necessarily be based upon reasonable probabilities rather than upon mere possibilities . . . ." (*Watson, supra*, at p. 837.)

In this case, C. could, and did, testify at length regarding the nature of her conversation with defendant in his car on October 26, 2013, shortly before the attack on C. in her home on November 7, 2013. (Cf. *Ayers, supra*, 51 Cal.App.3d at pp. 377-378 [any error in admitting recordings made by a private individual without the defendant's consent was harmless, in part because "both [men solicited to commit murder] testified at the trial and could have testified to all of the matters contained on the tapes without any contention that defendants' rights were violated"].) The recording of defendant's conversation was not admitted for the truth of his statements or as evidence of his bad character. (See *ante*, fn. 9.)

Further, there was evidence of the following facts. Styre was caught and arrested at C.'s home on the day of the attack, November 7, 2013. At trial, the testimony of Styre's mother linked defendant to the attack. Styre's mother had last seen her son leaving with an Asian man named Bui at 6:30 a.m. on November 7, 2013. Later that same morning, the man had returned Styre's wallet and cell phone to her. He later told Styre's mother that they needed to change their phone numbers. In the brief period of November 2, 2013 and November 7, 2013, 185 phone calls had been exchanged between the phone number of Styre's Huawei cell phone, and the phone number used by defendant and listed on the Huawei phone as a contact for "Tham." During a March 31, 2015 interview, Styre's mother was shown a photograph of defendant, whom she recognized. At trial, she was shown a photograph, which she said was Bui.

In light of the evidence as a whole, there is not a reasonable probability that defendant would have obtained a more favorable result had the audio recording not been admitted.

C. *Admission of Styre's Letter to his Mother*

Defendant argues on appeal that the letter written by Styre to his mother, which was sent from prison and dated March 4, 2015, was not admissible as a declaration against interest.

1. *Background*

The People filed a motion to permit the introduction of the letter as a declaration against interest in the expectation that Styre would refuse to testify at defendant's trial. The motion indicated that Styre had been charged with residential burglary and assault with a deadly weapon, had pleaded to both crimes, and was serving a five-year prison sentence. The trial court ruled that the proffered redacted letter was admissible.

At trial, Styre's mother remembered that she had received a letter from her son. She confirmed that it was her son's handwriting on the document identified as the People's exhibit 2. Despite being granted use immunity, Styre refused to testify about the attack on C. and was held in contempt.

The defense filed a written motion to reconsider the admission of the letter as a declaration against interest. The trial court ruled that the proffered letter, as redacted by the People, was admissible. The court stated: "I do think that the already redacted version labeled as attachment A to the People's Motions in limine is a statement against interest. I do think that the description of the crime is the statement against interest and I also believe that the jury is entitled to have some context to add credibility to the statement. [¶] The statement is a letter written to his mother, which has already been authenticated by Mr. Styre's mother." Taking into consideration the circumstances under which the letter was written, Styre's possible motivation as the declarant, and Styre's relationship to defendant, the trial court found the redacted letter to be reliable. The court found the letter was "in the nature of a penance" and had "religious overtones about being forgiven" by Jesus and his mother.

2. *The Declaration Against Interest Exception to the Hearsay Rule*

Hearsay statements are generally inadmissible (Evid. Code, § 1200, subd. (b)). Evidence Code section 1230, a statutory exception to the hearsay rule, provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true." The phrase "unavailable as a witness" includes the situation where the person is "[p]ersistent in refusing to testify concerning the subject matter of the declarant's statement despite having been found in contempt for refusal to testify." (Evid. Code, § 240, subd. (a)(6).)

A party seeking to admit a hearsay statement as a declaration against penal interest under Evidence Code section 1230 "must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611 (*Duarte*).) "[T]he rationale underlying the [Evidence Code section 1230] exception [for statements against a declarant's penal interest] is that 'a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest,' thereby mitigating the dangers usually associated with the admission of out-of-court statements. [Citation.]" (*People v. Grimes* (2016) 1 Cal.5th 698, 711 (*Grimes*), fn. omitted.)

" 'In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's

relationship to the defendant.' (*People v. Frierson* (1991) 53 Cal.3d 730, 745.)" (*Grimes, supra*, 1 Cal.5th at p. 711.) "[T]he nature and purpose of the against-interest exception does not require courts to sever and excise any and all portions of an otherwise inculpatory statement that do not 'further incriminate' the declarant." (*Id*. at p. 716.)

"We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion. [Citation.] Whether a trial court has correctly construed Evidence Code section 1230 is, however, a question of law that we review de novo. [Citations.]" (*Grimes, supra*, 1 Cal.5th at pp. 711-712.)

3. *Admission of Redacted Letter*

a. *Argument*

Defendant argues that the letter was not reliable because (1) it was written when Styre believed that he was no longer in danger of being prosecuted for murder since he had already been convicted of other crimes for his conduct, (2) it was "an attempt to improve his standing with his mother" by providing a "socially acceptable excuse for his actions" in her eyes—i.e., trying to provide for his family, and (3) it was an attempt "to shift blame . . . [to] someone else as the mastermind . . . the one with the bad intentions." Defendant also suggests that passages in Styre's letter show it was not reliable since Styre "felt free to exaggerate or fabricate facts" and admitted in the letter that he had previously lied to his mother.

Defendant asserts that most of the letter was not a declaration against interest and that the only statement possibly admissible was Styre's admission that he "tried to kill the resident." He argues that the trial court abused its discretion in admitting the proffered redacted letter.

b. *Against Declarant's Penal or Social Interest*

A statement is against the declarant's interest if "the statement, *when made*, . . . so far subjected him to the risk of . . . criminal liability . . . , or created such a risk of making him an object of hatred, ridicule, or *social disgrace* in the community, that a *reasonable*

man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230, italics added.) If a declarant's statement would not subject the declarant to the risk of criminal liability, then the statement may not be against penal interest. (See *People v. Rice* (1976) 59 Cal.App.3d 998, 1007 [former testimony was not a declaration against interest because "[i]t was elicited under a grant of immunity and could not have subjected her to criminal liability"]; see *People v. Gordon* (1990) 50 Cal.3d 1223, 1280-1281 (conc. opn. of Kennard, J.), disapproved on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 835.) But a conspiracy to commit an offense, such as murder, and the substantive offense are not the same offense for purposes of double jeopardy. (See *United States v. Felix* (1992) 503 U.S. 378, 389; see also *People v. Swain* (1996) 12 Cal.4th 593, 602 ["conspiracy is a specific intent crime requiring an intent to agree or conspire, and a further intent to commit the target crime, here murder, the object of the conspiracy"; "where the conspirators agree or conspire with specific intent to kill and commit an overt act in furtherance of such agreement, they are guilty of conspiracy to commit express malice murder"].) Consequently, there was no evidence before the trial court that double jeopardy barred a prosecution of Styre for conspiracy to commit murder when he wrote the letter.

"The test imposed [by Evidence Code section 1230] is an objective one—would the statement subject its declarant to criminal liability such that a reasonable person [in the declarant's position] would not have made the statement without believing it [to be] true. [Citations.]" (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1678, fn. omitted.) Here, a reasonable person in the declarant's position would have realized that he was subjecting himself to the risk of liability for conspiracy to commit murder and would not have made the statement unless he believed it to be true.

Furthermore, Styre's statement that he had intended to kill for money and other compensation was against his social interest. While Styre did attempt to mitigate the gravity of his acts in his mother's eyes by explaining his supposed motivation to help his

mother and sister, the letter clearly indicates that Styre understood that his conduct would be sinful or shameful to his mother and sought forgiveness from his mother for the wrongs he had done.[12] Styre was not bragging about his actions or attempting to enhance his reputation for violence or criminality. This was not a situation in which a declarant's statement reasonably could be found not to be against his social interest under the particular circumstances. (Cf. *People v. Lawley* (2002) 27 Cal.4th 102, 155 (*Lawley*) [declarant was a convicted felon who was seeking full membership in the Aryan Brotherhood, and his statement that he killed at the gang's direction may have been "designed to enhance [the gang's] prestige or his own"].)

The trial court did not abuse its discretion in concluding that Styre's incriminating statements were declarations against interest.

c. *Indicia of Trustworthiness*

"[E]ven when a hearsay statement runs generally against the declarant's penal interest and redaction has excised exculpatory portions, the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission. [Citations.]" (*Duarte*, *supra*, 24 Cal.4th at p. 614.) " 'To determine whether [a particular] declaration [against penal interest] passes [section 1230's] required threshold of trustworthiness, a trial court "may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." ' [Citation.]" (*Ibid.*)

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[12] "If a judgment rests on admissible evidence it will not be reversed because the trial court admitted that evidence upon a different theory, a mistaken theory, or one not raised below. [Citations.] . . . ' "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for the wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." ' [Citation.]" (*People v. Brown* (2004) 33 Cal.4th 892, 901.)

Even if Styre subjectively believed that he was not in danger of a further criminal prosecution when he wrote the letter, Styre did not try to blame, or shift responsibility to, somebody else for his actions. No other person was named in the letter. Styre admitted that he had intended to kill someone for money, and he apologized for lying about his going to a construction job, explaining that "we knew if you were told anything different than it was a construction job, you would [have] . . . tr[i]ed to prevent it and me from doing what I went to do." He states that "[i]t all went wrong because the people [who] were asleep in another room woke up . . . . and we fought with baseball bats." He asked his mother to forgive him. Styre's letter did not present his intent or attempt to kill as praiseworthy, claim that his actions had been coerced by someone else, or assert that he had been acting in justifiable self-defense. The fact that Styre's incriminating statements were made in a very personal, confessional letter from son to mother which asked for her forgiveness, and not in a coercive setting, added to the reliability of the statements.

The trial court did not abuse its discretion in concluding there were sufficient indicia of trustworthiness to make Styre's statements against interest qualify as an exception to the hearsay rule under Evidence Code section 1230.

d. *Portions of Styre's Redacted Letter That Were Not Clearly Against Interest*

The prosecutor as the moving party was entitled to introduce the portions of Styre's letter made admissible by Evidence Code section 1230. The court believed that the jury was also "entitled to have some context to add credibility to the statement."[13]

[13] Evidence Code section 356 states: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." The opponent, not the proponent, of a statement against interest may seek the admission of additional parts of a writing under Evidence Code section 356. (See *Lawley*, *supra*, 27 Cal.4th at p. 155.)

Defendant maintains that "[e]ven if parts of the admitted portion of the letter contained declarations against interest, most of what was admitted should have been excluded."

In *People v. Leach* (1975) 15 Cal.3d 419 (*Leach*), the Supreme Court "construe[d] the exception to the hearsay rule relating to evidence of declarations against interest set forth in section 1230 of the Evidence Code to be inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." (*Id*. at p. 441, fn. omitted.) The Supreme Court "long ago determined that 'the hearsay exception should not apply to collateral assertions within declarations against penal interest.' [Citation.]" (*Duarte*, *supra*, 24 Cal.4th at p. 612.)

"[The Supreme Court has] applied *Leach* to bar admission of those portions of a third party's confession that are self-serving or otherwise appear to shift responsibility to others. [Citations.] But [the court has] permitted the admission of those portions of a confession that, though not independently disserving of the declarant's penal interests, also are not merely 'self-serving,' but 'inextricably tied to and part of a specific statement against penal interest.' (*People v. Samuels* (2005) 36 Cal.4th 96, 120-121 (*Samuels*) [upholding the trial court's admission of declarant's assertion that the defendant had paid him to kill the victim, and rejecting the argument that the reference to the defendant 'should have been purged,' where the statement in question was 'in no way exculpatory, self-serving, or collateral'].) In *Samuels*, [the court] applied the *Leach* rule to admit evidence that inculpated the defendant." (*Grimes*, *supra*, 1 Cal.5th at p. 715.)

Defendant now contends that the admission of the redacted letter violated due process because he had no opportunity to cross-examine Styre and "[t]he letter by itself was too unreliable to be admitted under the due process clause."[14] Since defendant did not raise due process objections to the admission of any portion of Styre's letter in the trial court, he is limited to arguing that the asserted error in admitting portions of the

[14] Defendant recognizes that Styre's letter was not testimonial and its admission did not violate the Sixth Amendment right to confront adverse witnesses.

letter over his objections based on Evidence Code section 1230 had the additional legal consequence of violating due process. (See *Partida*, *supra*, 37 Cal.4th at p. 435.)

We have concluded that Styre's inculpatory statements were properly admitted under Evidence Code section 1230. Further, Styre's statement indicating that someone was paying him to kill was "inextricably tied to and part of a specific statement against penal interest" (*Samuels*, *supra*, 36 Cal.4th at p. 121) that he had gone to "kill a person at that house" and therefore properly admitted. The letter indicated that Styre and someone else ("we") had lied to Styre's mother about Styre going to a construction job when Styre was actually going to kill someone. That statement was inextricably part of Styre's statement against interest because it was indicative of a conspiracy to commit murder.

e. *No Prejudicial Error*

Assuming arguendo that it was error not to further redact Styre's letter to eliminate his self-serving or collateral statements that were *not* inextricably tied to a statement against interest (see *Duarte*, *supra*, 24 Cal.4th at p. 612; Evid. Code, § 1230), it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of such error. (See *Watson*, *supra*, 46 Cal.2d at p. 836; see also *Duarte*, *supra*, 24 Cal.4th at p 619 [*Watson* standard of review applies to the improper admission of hearsay evidence under state law].) Such error did not render defendant's trial fundamentally unfair. As already discussed, a mere error of state law is not a denial of due process. (See *Engle*, *supra*, 456 U.S. at p. 121, fn. 21; *Rivera*, *supra*, 556 U.S. at p. 158.)

D. *Ineffective Assistance of Counsel Regarding Styre's Letter*

Insofar as defendant is suggesting that he received ineffective assistance of counsel because defense counsel did not object to the admission of Styre's letter on the same due process grounds that he raises on appeal—i.e., the lack of an opportunity to cross-examine Styre and inadequate indicia of reliability, we reject the contention. Defendant has not demonstrated on appeal that such a due process objection would have

been meritorious or that there is a reasonable probability that the result of the proceeding would have been different if his counsel had made such an objection. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694, 697, 700 (*Strickland*); *Harrington v. Richter* (2011) 562 U.S. 86, 105, 111-112 (*Harrington*).)

Ohio v. Roberts (1980) 448 U.S. 56, which had held under the Sixth Amendment's confrontation clause that the hearsay statement of an unavailable declarant was inadmissible at trial unless the statement had adequate indicia of reliability, meaning at least "particularized guarantees of trustworthiness" (*id*. at p. 66, fn. omitted), was abrogated by *Crawford v. Washington* (2004) 541 U.S. 36, 60-69 (*Crawford*). After *Crawford*, "[o]nly [testimonial statements] cause the declarant to be a 'witness' within the meaning of the Confrontation Clause. [Citation.] It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Davis v. Washington* (2006) 547 U.S. 813, 821.)

"The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment" (*Strickland, supra*, 466 U.S. at pp. 684-685), including the Confrontation Clause. The United States Supreme Court has concluded in various contexts that "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." (See *Perry v. New Hampshire* (2012) 565 U.S. 228, 245 [concluding that "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness"]; see *People v. Cage* (2007) 40 Cal.4th 965, 981, fn. 10 ["[T]here is no basis for an inference that, even if a hearsay statement is nontestimonial, it must nonetheless undergo a *Roberts* analysis before it may be admitted under the Constitution."]; see also Simons, Cal. Evid. Manual (2018 ed.) § 2.113, pp. 216-217

["There is no reason to believe that the *Roberts* reliability test will be resurrected through the Due Process Clause . . . ."].)

The erroneous admission of nontestimonial hearsay does not automatically rise to the level of a constitutional violation of due process. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 813 [defendant's assertion that a child's out-of-court statement lacked particularized guarantees of trustworthiness was insufficient to establish that its erroneous admission at trial violated due process].) Defendant has not demonstrated that there was a meritorious due process objection to Styre's letter. (See *Michigan v. Bryant* (2011) 562 U.S. 344, 370, fn. 13.)

E. *CALCRIM No. 315*

The trial court instructed the jury pursuant to CALCRIM No. 315, the standard Judicial Council instruction regarding eyewitness identification. The instruction told the jurors that in evaluating identification testimony they must consider, among other questions, "How certain was the witness when he or she made an identification?" Defendant asserts that this portion of the instruction was "incorrect because there is no correlation between the witness's certainty and the accuracy of an identification."

The California Supreme Court has granted review in *People v. Lemcke*, review granted Oct. 10, 2018, S250108, which raises the same issue. The court has framed the pending issue as follows: "Does instructing a jury with CALCRIM No. 315 that an eyewitness's level of certainty can be considered when evaluating the reliability of the identification violate a defendant's due process rights?" (<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2257737&doc_no=S250108&request_token=NiIwLSIkTkw%2BW1BdSCJNXE1JUFw0UDxTJiJeQzpRMCAgCg%3D%3D> [as of March 25, 2019].)

Existing decisions uphold the validity of an instruction like the one now being challenged. In *People v. Johnson* (1992) 3 Cal.4th 1183 (*Johnson*), the trial court instructed the jury, pursuant to CALJIC No. 2.92, to consider "[t]he extent to which the

witness was either certain or uncertain of the identification" in evaluating eyewitness identification testimony. (*Johnson, supra,* at p. 1230, fn. 12.) The California Supreme Court held that the instruction was not error, even though the defense expert "testified without contradiction that a witness's confidence in an identification does not positively correlate with its accuracy." (*Id*. at p. 1231.) The court determined that "if the jury was persuaded by [the expert's] testimony, the instructions allowed it to infer that [the victim's] positive identification was not necessarily an accurate one." (*Id*. at p. 1232.)

In *People v. Sánchez* (2016) 63 Cal.4th 411 (*Sánchez*), the trial court gave CALJIC No. 2.92, another standard instruction regarding evaluation of eyewitness identification, which indicated that jurors should consider " 'the extent to which the witness is either certain or uncertain of the identification.' " (*Sánchez, supra*, at p. 461, fn. omitted.) "Citing scientific studies that conclude there is, at best, a weak correlation between witness certainty and accuracy, [the] defendant argue[d] the court erred in instructing the jury it could consider the certainty factor." (*Ibid*.) Although the California Supreme Court found the defendant's claim had been forfeited by his failure to request modification of the instruction in the trial court (*ibid*.), it pointed out that it had twice upheld the propriety of the certainty factor. (*Id*. at p. 462.) The court also observed that "[s]tudies concluding there is, at best, a weak correlation between witness certainty and accuracy are nothing new" (*ibid*.) but acknowledged that "some courts have disapproved instructing on the certainty factor in light of the scientific studies. [Citations.]" (*Ibid*.)

In any case, the Supreme Court found that the instruction regarding the degree of an eyewitness's certainty was not prejudicial. (*Sánchez, supra*, 63 Cal.4th at pp. 462-463.) The court stated: "The instruction cited the certainty factor in a neutral manner, telling the jury only that it could consider it. It did not suggest that certainty equals accuracy. In this case, telling it to consider this factor could only benefit [the] defendant when it came to the uncertain identifications, and it was unlikely to harm him regarding

the certain ones." (*Id*. at p. 462.) It concluded that, "[m]oreover, the eyewitness identifications were far from the only evidence connecting [the] defendant to the crimes." (*Id*. at p. 463.)

Like the defendant in *Sánchez*, defendant forfeited any objection to the court's instruction pursuant to CALCRIM No. 315 by failing to request its modification. (See *Sánchez*, *supra*, 63 Cal.4th at pp. 461-462.) Moreover, under the currently existing case law, we have no authority to conclude that the trial court gave an erroneous instruction. Until *Lemcke* is decided and prior decisions are overruled, this court is bound by precedent. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["The decisions of [the California Supreme Court] are binding upon and must be followed by all the state courts of California"].)

We also reject defendant's concomitant claim that he received ineffective assistance of counsel because defense counsel did not object to the instruction's "certainty factor." "Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile." (*People v. Price* (1991) 1 Cal.4th 324, 387.)

Defendant also cannot establish the prejudice prong of an ineffective assistance of counsel claim. As in *Sánchez*, the instruction being challenged on appeal did not equate the certainty of a witness's identification with its accuracy. A witness's certainty was only one among many factors that the jury was told to consider in evaluating an eyewitness identification. Also, a witness's certainty might be related to the witness's prior familiarity with a perpetrator, vantage point, length of exposure to the perpetrator, or relevant factors other than a mere gut certainty. In any event, C. did not testify to the degree of her certainty in identifying defendant in the enhanced video images, and she acknowledged that she had been unable to identify him in the actual video.

Further, C. was not like an eyewitness or victim who sees a stranger perpetrate a crime and then identifies a person in court or in a photographic lineup as the perpetrator.

She knew defendant well before the arson of her home, and she identified the man shown in enhanced video images as defendant. The jurors could see defendant at trial, they could examine the enhanced video images, which were admitted at trial, and they could compare them for themselves. In addition, there was evidence corroborating defendant's involvement in the arson of C's home, including his angry and accusatory text messages to her later the same day.

Defendant has failed to demonstrate that there is a reasonable probability that the result of the proceeding would have been different had defense counsel objected to the instruction. (*Strickland*, *supra*, 466 U.S. at pp. 687, 694; *Harrington*, *supra*, 562 U.S. at pp. 111-112.)

F. *Cumulative Prejudice*

Defendant contends the cumulative effect of the errors requires reversal of the judgment. We have not found multiple instances of error resulting in cumulative prejudice that in the aggregate is "greater than the sum of the prejudice of each error standing alone. [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 845.) This is not a situation where "a series of trial errors," which are independently harmless, have risen "by accretion to the level of reversible and prejudicial error. [Citations.]" (*Id.* at pp. 844-845.)

G. *Review of Ex Parte Hearing*

Defendant requests that this court review the sealed transcript of an ex parte hearing to determine whether the trial court acted properly and whether information should have been disclosed to the defense. The People have no objection to such examination. We have reviewed the sealed record of the hearing held out of the presence of defendant and defense counsel. It discloses no error.

H. *Section 654*

At the time of sentencing, the trial court found that there was "sufficient separation as to the conspiracy to commit murder [count 1] that the burglary in that matter [count 2]

is not 654." Defendant maintains that the punishment for count 2, first degree burglary (entry of an inhabited dwelling with the intent to commit murder) (§§ 459, 460, subd. (a)), must be stayed pursuant to section 654. We agree.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "[U]nder section 654, [a] defendant may not be punished for both the underlying crimes and the conspiracy [where] there was no showing that the object of the conspiracy was any broader than commission of the underlying crimes. (*In re Romano* (1966) 64 Cal.2d 826, 828-829; *In re Cruz* (1966) 64 Cal.2d 178, 180-181; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 615-617.)" (*People v. Lewis* (2008) 43 Cal.4th 415, 539 (*Lewis*), disapproved on another point in *People v. Black* (2014) 58 Cal.4th 912, 919-920.) For example, "[u]nder Penal Code section 654, a defendant may not be punished for both the murder and the conspiracy [to commit murder] (*People v. Moringlane* (1982) 127 Cal.App.3d 811, 819)." (*People v. Hernandez* (2003) 30 Cal.4th 835, 866 (*Hernandez*), disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.)

The People nevertheless suggest that under section 654, a defendant can "suffer separate punishment for a conspiracy to commit murder and [a] residential burglary with the intent to commit murder" because the conspiracy and the residential burglary involved "separate acts" and "did not comprise an indivisible course of conduct." This is not a correct statement of existing California law.

Generally, when two or more people conspire to commit a felony, they are "punishable in the same manner and to the same extent as is provided for the punishment of that felony." (§ 182, subd. (a).) "[A] defendant cannot be punished for both a substantive offense and a conspiracy to commit it unless the conspiracy had an unlawful objective in addition to the commission of the substantive offense." (*In re Romano*,

supra, 64 Cal.2d at p. 828 (*Romano*).) Section 654's prohibition against multiple punishment would be violated by "sentenc[ing] a defendant for conspiracy to commit several crimes and for each of those crimes where the conspiracy had no objective apart from those crimes." (*In re Cruz*, *supra*, 64 Cal.2d at pp.180-181 (*Cruz*).) "If, however, a conspiracy had an objective apart from an offense for which the defendant is punished, he may properly be sentenced for the conspiracy as well as for that offense. [Citation.]" (*Id.* at p. 181.)

In other words, "no double punishment occurs when one is punished for a conspiracy which encompasses a number of acts, only some of which are punished independently as substantive offenses. Double punishment occurs when a conspiracy has multiple objects and *all* are punished as substantive offenses, just as when the conspiracy has but one object which is punished as a substantive offense. [Citation.] On the other hand, there is no double punishment in sentencing for a conspiracy and a substantive offense which is *not* an object of the conspiracy. [Citation.]" (*People v. Ramirez*, *supra*, 189 Cal.App.3d at pp. 616-617.)

Here, the sole object of the conspiracy was to enter C.'s home and kill her, and the burglary was committed to accomplish only that object. The punishment on count 2 must be stayed. (See *Lewis*, *supra*, 43 Cal.4th at p. 539, *Hernandez*, *supra*, 30 Cal.4th at p. 866; *Romano*, *supra*, 64 Cal.2d at p. 828; *Cruz*, *supra*, 64 Cal.2d at pp. 180-181.)

I. *The Sentence Imposed on Count 4*

On count 4, the jury found defendant guilty of arson of an inhabited structure in violation of section 451, subdivision (b), and it found true the special allegation that he committed that offense by using a device designed to accelerate the fire within the meaning of section 451.1, subdivision (a)(5). The trial court also found true the following: (1) the two allegations of a prior strike conviction under the Three Strikes law (§§ 667, subd. (b)-(i); 1170.12); (2) the two allegations of a prior serious felony conviction (§ 667, subd. (a)); (3) the two prior prison term allegations within the meaning

of section 667.5, subdivision (b); and (4) the one prior prison term allegation within the meaning of section 667.5, subdivision (a).

On count 4, the trial court sentenced defendant to 30 years to life and a consecutive 12-year term, consisting of two five-year enhancements under section 667, subdivision (a), and two one-year prior prison term enhancements under section 667.5, subdivision (b). It stayed the three-year enhancement term under section 667.5, subdivision (a), pursuant to "*People v. Jones*." (See *People v. Jones* (1993) 5 Cal.4th 1142, 1148-1149; Cal. Rules of Court, rule 4.447; but see *People v. Perez* (2011) 195 Cal.App.4th 801, 805 [trial court should have struck rather than stayed the section 667, subdivision (b) enhancement].)

Defendant argues, and the People concede, that the trial court should have imposed an indeterminate term of 25 years to life to be served consecutively to a determinate term of 17 years on count 4. Section 451.1, subdivision (a)(5), provides for the imposition of an enhancement term of three, four, or five years if it is found true that "[t]he defendant committed arson as described in subdivision . . . (b) . . . of [s]ection 451 and the arson was caused by use of a device designed to accelerate the fire or delay ignition." In this case, the trial court selected a five-year enhancement, which is a determinate term. An indeterminate life term imposed as a Third Strike sentence under the Three Strikes law must be "served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law." (§§ 667, subd. (e)(2)(B); 1170.12, subd. (c)(2)(B); see *People v. Hendrix* (1997) 16 Cal.4th 508, 515; see also § 669, subd. (a).)

The judgment must be modified accordingly. "[I]t is well established that the appellate court can correct a legal error resulting in an unauthorized sentence . . . at any time. [Citation.]" (*People v. Sanders* (2012) 55 Cal.4th 731, 743, fn. 13.)

J. *New Discretion to Strike Enhancement for Prior Serious Felony Conviction*

At the time of defendant's trial and sentencing, courts had no authority to strike a prior serious felony conviction to avoid imposing a five-year enhancement under section 667, subdivision (a). Effective January 1, 2019 (see Stats. 2018, ch. 1013, § 2]; Gov. Code, § 9600, subd. (a)), section 1385 was amended to delete the provision prohibiting a judge from striking a prior serious felony conviction enhancement. Section 667, subdivision (a), also was amended to omit its reference to section 1385, subdivision (b). (See Stats. 2018, ch. 1013, § 1.) Section 1385 now permits a court "in furtherance of justice" to exercise its discretion to strike or dismiss a five-year enhancement for a prior serious felony conviction.

While a trial court's discretion under section 1385 is "broad, [it] is by no means absolute." (*People v. Orin* (1975) 13 Cal.3d 937, 945 (*Orin*).) Section 1385's phrase "in furtherance of justice" requires the court to consider a defendant's constitutional rights and the interests of society. (*Orin*, *supra*, at p. 945.) An exercise of discretion under section 1385 must at least be reasonable. (*Orin*, *supra*, at p. 945.) It cannot " 'fall[] outside the bounds of reason' under the applicable law and the relevant facts. [Citations.]" (*People v. Williams* (1998) 17 Cal.4th 148, 162.)

Defendant argues that this case should be remanded to permit the trial court to exercise its discretion as to whether to dismiss the prior serious felony enhancements. Appellant argues, and the People concede, that the new provisions retroactively apply to defendants whose appeals are not final on the law's effective date. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [an inference of retroactivity may be drawn when the Legislature amends a statute to lessen the punishment]; see also *People v. Brown* (2012) 54 Cal.4th 314, 323 ["When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. (Fn. omitted)"].)

Estrada's reasoning and presumption of retroactivity also may apply where statutory changes ameliorate the *possible* punishment for a class of persons or particular crime. (See *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303-304 [Proposition 57's requirement of a juvenile transfer hearing before a juvenile may be tried as an adult and elimination of direct filing in adult court apply retroactively]; *People v. Francis* (1969) 71 Cal.2d 66, 75 [possession of marijuana made a wobbler rather than a straight felony].)

The People nevertheless maintain that a "remand for resentencing is unwarranted" in this case because the trial court's statements at sentencing clearly indicate that it would not have struck or dismissed any prior serious felony enhancement even if it had had such discretion. In denying defendant's *Romero* motion, the trial court stated: "[Defendant] has a history of continuing criminality [and] of increased seriousness of criminality. The crimes in this current case were exceptionally dangerous and violent, and I think that he would be a continuing threat to our community if released." The court expressly stated that it was choosing consecutive sentencing based on the aggravating factors in the case. It further stated: "Mr. Bui is going to spend the rest of his life in prison. He has shown [himself] to be a danger to this community. . . . [¶] I have genuine fears for the victim in this case. Even though Mr. Bui will be incarcerated for the remainder of his life, I have continuing fears for the victim in this case. Mr. Bui showed in Count 1 . . . his ability to have others commit violent crimes on his behalf."

Although defendant insists that the trial court's sentencing decisions do not demonstrate that a remand would be futile, he has suggested no factual basis for a proper exercise of discretion under section 1385. The probation report indicated that "defendant's criminal history is lengthy, serious, and continuous." It reported that the current crimes did not occur as the result of mental illness. It stated that the "heinousness of the defendant's behavior in the current matter is inconceivable" and that "[t]he complete disregard of human life [that] the defendant has demonstrated by attempting to harm [the victim] in numerous ways is unimaginable."

Under the particular circumstances of this case, a remand would serve no purpose. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) The law does not require idle acts. (Civ. Code, § 3532; see *People v. Medina* (1995) 11 Cal.4th 694, 739.)

DISPOSITION

The judgment is modified to (1) stay the sentence imposed on count 2, (2) impose an indeterminate term of 25 years to life to be served consecutively to a determinate term of 17 years on count 4, and (3) reflect consecutive indeterminate terms of 75 years to life (count 1), 25 years to life (count 4), and 25 years to life (count 6) to be served consecutively to a total determinate term of 41 years. As modified, the judgment is affirmed.

_____

ELIA, ACTING P. J.

WE CONCUR:

_____

BAMATTRE-MANOUKIAN, J.

_____

MIHARA, J.

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